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92-648

Case Number: _____

IN THE
SUPREME COURT OF THE UNITED STATES
SEPTEMBER TERM, 1992

EDWIN KOTROSITS, ET AL.,

Petitioners

vs.

GATX CORPORATION NON-CONTRIBUTORY
PENSION PLAN FOR SALARIED EMPLOYEES,

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Third Circuit Court of Appeals' decision reversing the decision of the District Court and denying Petitioner class members certain retirement and welfare benefits represented an inappropriate disregard of the District Court's discretionary findings of fact that the Plan fiduciaries acted in bad faith and under a conflict of interest when they denied Petitioners' claims for benefits, thereby effectively circumventing the arbitrary and capricious test developed by the Eleventh Circuit Court of Appeals in Brown v. Alabama Blue Cross/Blue Shield, Inc., 889 F.2d 1556 (11th Cir. 1991), cert. den. 484 U.S. 1012, 111 S. Ct. 712, 112 L. Ed. 2d 701 (1991), and substantially impairing employees' rights to recover pension and welfare benefits under ERISA?

CERTIFICATE OF INTERESTED PARTIES

I hereby certify that:

1. The panel of judges below at the Third Circuit Court of Appeals are The Honorable Walter K. Stapleton, The Honorable Anthony J. Scirica, and The Honorable Jane R. Roth.

2. Plaintiffs below, Petitioners in this Court, are Edwin Kotrosits, Julius Ruggeri and Marvyn Souders, on their own behalf, and on behalf of all others similarly situated.

3. Counsel for Plaintiffs below, Petitioners in this Court, is Seymour Traub, Esq., of Traub, Butz & Fogerty, P.C.

4. Defendant below, Respondent in this Court, is GATX Corporation Non-Contributory Pension Plan for Salaried Employees.

5. Counsel for Defendant below, Respondent in this Court, is Herbert L. Zarov and Kenneth E. Wile, of Mayer, Brown & Platt.

Respectfully submitted,

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CITES TO THE DISTRICT COURT AND COURT OF APPEALS

The opinion of the District Court is found at 757 F. Supp. 1434 (E.D.Pa. 1991).

The opinion of the Court of Appeals is found at 1992 U.S. App. LEXIS 1510, 15 E.B.C. 1729 (1992).

STATEMENT OF GROUNDS ON WHICH JURISDICTION INVOKED

The final judgment by the District Court was entered on February 25, 1991. On April 15, 1991, an Order was entered in the District Court denying the Plan's Motion for a New Trial, or in the alternative, to Amend the Judgment. The opinion of the Court of Appeals reversing the District Court decision was filed on July 6, 1992.

Petitioners are authorized to seek review of this matter by Rule 17, Rules of the United States Supreme Court and 28 U.S.C. Section 2101.

STATUTES AND REGULATIONS INVOLVED

The Employee Retirement Income Security Act, 29 U.S.C. §1001 *et. seq*.

STATEMENT OF THE CASE AND THE FACTS

Plaintiffs are former longtime employees of Fuller Company. Fuller was a direct subsidiary of GATX Corporation from 1954 to 1975, at which point it became a wholly-owned subsidiary of General American Transportation Company ("GATC"), a subsidiary of GATX. It remained so up until December 31, 1986, when GATX and GATC severed their relationships with Fuller by selling all its stock to an entity known as F. A. Holding Company.

As a result of their Fuller employment, Plaintiffs were participants in the GATX CORPORATION NON-CONTRIBUTORY PENSION PLAN FOR SALARIED EMPLOYEES ("the Plan"). The Plan document provided for payment of a particular form of retirement benefits, i.e., "the 75/80 benefits," to any employee (a) whose age and years of service added up to 80, or who was at least 55 years of age, and his age and years of service added up to 75; and (b) who

experienced a termination of employment due to layoff, permanent plant shutdown or disability. The Plan contained no definition or explanation of the term, "layoff."

The Plan is a non-contributory defined benefit plan. That is, the employer makes all of the contributions, and the monthly amount received by each pensioner is determined based upon a formula taking into consideration the employee's salary during a certain period of employment with a participating company.

Under the Plan, a participating subsidiary such as Fuller was responsible for making contributions associated with its employees. However, after its December 31, 1986 sale of Fuller, GATX was solely responsible for any contributions needed after that date to fund payment of retirement benefits to any former Fuller participants in the Plan.

The GATX/GATC sale of the Fuller stock on December 31, 1986, took place pursuant to a Stock Purchase Agreement executed by the pertinent parties (i.e., GATX, GATC and F.A. Holding Co.), on October 12, 1986. This Agreement contained a specific provision providing that the sale constituted a "termination of employment" of all Fuller employees. Furthermore, there was no language whatsoever in the Agreement obligating F.A. Holding to continue operating Fuller or to retain or rehire any of the people who had worked for Fuller prior to the December 31, 1986 closing. The Stock Purchase Agreement differed from an earlier draft which had called for Fuller-related assets and liabilities under the Plan to be transferred to F.A. Holding; indeed, there was no language even obligating F.A. Holding or the new Fuller Company to adopt their own pension plan. The Agreement also obligated GATX to indemnify

F.A. Holding against "any and all claims, liabilities, losses, damages, costs and expenses relating to or arising directly or indirectly out of a claim that [the Plan] required providing subsidized early retirement benefits [i.e., 75/80 benefits] . . . ."

At the time of the Fuller sale, the three representative Plaintiffs each qualified, from an age and years of service standpoint, for 75/80 benefits. Each requested those benefits before December 31, 1986 but was rejected.

When the Stock Purchase Agreement was signed on October 12, 1986, the Plan Administrator, James Herbert (who also happened to be Director of Employee Benefits at GATX), had not yet decided whether to permit Fuller employees who were being terminated pursuant to that Agreement to pursue 75/80 retirements. He did, however, request GATX' actuaries to determine the increased pension cost which would result if

Fuller employees elected the 75/80 option. The actuaries advised that it would cost at least an additional $2 Million.

On November 19, 1986, Mr. Herbert travelled to Fuller's offices in Bethlehem, PA, and made two significant announcements:

(a) he would not allow any Fuller employees to elect the 75/80 point retirement option, and

(b) that any Fuller employee who did not retire before December 31, 1986, would lose certain welfare benefits (i.e., lifetime medical and life insurance benefits), which up to then had been available to all retiring Plan participants.[1]

As the District Court correctly noted, the timing of Mr. Herbert's decision to deny

[1]No threats were made nor was any action taken to deprive any Plan participants other than Fuller employees of these welfare benefits.

75/80 benefits (i.e., after receiving notification of the significant amount those benefits would cost the Plan) is significant because the Stock Purchase Agreement had already been signed at that point and GATX knew it would have suffered a significant loss in the net proceeds in that transaction since it could not pass those additional pension costs on to the purchaser, F. A. Holding. Of equal if not greater significance is that by denying Plaintiffs' claim for 75/80 point benefits, GATX was further able to avoid the expense of the lifetime medical and life insurance benefits which would have been payable to the Souders' subclass if its members had been allowed to elect 75/80 retirement before December 31, 1986. As with the added pension costs, GATX could not pass these on to F. A. Holding since they had already signed, sealed and delivered the Stock Purchase Agreement, and that document (in

Section 5.10(i)) obligated F. A. Holding to reimburse GATX only a fixed sum, i.e., $600,000.00, of the annual costs incurred by GATX in providing post-sale health and welfare benefits "to former employees of Fuller who have retired prior to the closing date . . . ."

Edwin Kotrosits and Julius Ruggeri represent a subclass of employees who were 55 years of age or older as of the December 31, 1986, closing. Based on their age and years of service, the members of this subclass qualified to elect (which they did when their 75/80 requests were rejected) an actuarially-reduced 55/15 early retirement. They did so however, only because they were threatened and scared that if they did not they would lose the lifetime welfare. Marvyn Souders represents a subclass of Fuller employees/participants who had not yet reached 55 years of age as of the closing date.

None of the Plaintiffs knew whether they would have jobs with the new company when they left work on December 31, 1986. They were told they would learn after the sale. On January 2, 1987, both Messrs. Kotrosits and Ruggeri received calls inviting them to work with the new Fuller Company. Mr. Souders was told on January 5, 1986 to report on January 6, 1986 to the Fuller facility where he had worked previously.

After the December 31, 1986 closing, the representative Plaintiffs pursued claims under the Plan's administrative process. The Plan Administrator, James Herbert (Director of Employee Benefits at GATX) denied those claims. Plaintiffs appealed to the three-person Benefits Committee, James Glasser, President and Chief Executive Officer of GATX; Paul Heinen, Vice President and General Counsel of GATX; and Roland Finkelman (also Mr. Herbert's boss), Vice President of Human

Resources at GATX. The Benefits Committee denied the appeals on the grounds that the employees did not suffer a "layoff" under Section 4.5(a) of the Plan.

These "fiduciaries" attempted to rest these not-unexpected denials on the supposed similarity and applicability of prior GATX transactions involving (1) Marine Transport Lines, Inc., (2) GARD Division, (3) Richmond Terminal, (4) Pollock, and (5) GATC (Sharon, PA). However, these were readily distinguishable (in ways they were not told or knew and chose to disregard) from the Fuller sale.

In 1983, GATX spun off the shares of a wholly-owned subsidiary, Marine Transport Lines, Inc ("MTL"), as a special dividend to GATX shareholders. This transaction differed from the Fuller sale in that GATX received no consideration in return for the spun-off MTL shares. Furthermore, MTL management (not the

Plan fiduciaries), gave five employees the option of electing a layoff prior to the spin off so they could obtain a 75/80 retirement.

On April 12, 1984, GATX sold the property and assets of its GARD, Inc., division/subsidiary to Chamberlain Manufacturing Corporation. Chamberlain assumed all liabilities for pension benefits arising under the plan relative to GARD employees. In addition, the Asset Purchase Agreement obligated Chamberlain to establish a separate pension plan to cover GARD employees, which had to be substantially similar to Chamberlain's existing plan. F. A. Holding was not obligated here to provide a Plan for the new Fuller employees.

In September, 1984, GATX Tank Storage Terminals Corporation sold its Richmond Terminal to Unitank Terminal Service. The language in the Agreement of Sale specifically provided that (a) the Richmond Terminal

employees "shall" become employees of the buyer, and (b) the asset/sale transaction was not to be considered a termination of employment for the salaried employees of the Richmond Terminal.[2]

TEC was a wholly-owned subsidiary of GATC and a second tier subsidiary of GATX. In June, 1984, GATX sold TEC's assets to Brown Minneapolis Tank and Fabricating Company. Notwithstanding its knowledge that Brown Minneapolis was considering hiring some TEC employees, the Plan granted 75/80 pensions to all 11 TEC employees who qualified in terms of age and years of service. Two of TEC's employees, Messrs. Deason and Miller, received 75/80 layoff pensions as well as jobs with Brown Minneapolis.

Following the rejection by the Benefits Committee, Petitioners filed this action in

[2]As noted before, the Agreement here provided the opposite.

the United States District Court for the Eastern District of Pennsylvania. After extensive discovery and the filing of numerous Briefs and Stipulations of Fact with the Court, the Honorable Edward N. Cahn issued a seventy-eight (78) page Opinion in support of an Order wherein he held that (a) members of both subclasses were entitled to 75/80 benefits, and (b) members of the SOUDERS subclass were also entitled to the lifetime medical and life insurance welfare benefits they would have received had they been properly permitted to elect 75/80 retirement on or before December 31, 1986. In his detailed and well-reasoned Opinion, Judge Cahn made factual findings that (a) the Plan fiduciaries had been operating under a conflict of interest, (b) Petitioners had indeed suffered a "layoff" because of their temporary suspension of work at the time of the December 31, 1986 closing, and that the

Plan had acted in bad faith in first refusing to disclose to the Petitioners how their pension benefits were to be handled in conjunction with the sale and in later using the threat of the loss of the lifetime welfare benefits to intimidate and coerce the Plaintiffs into submitting forms electing an actuarially-reduced 55/15 retirement. Under the test established by the Eleventh Circuit Court of Appeals in Brown v. Blue Cross/Blue Shield of Alabama, Inc., 898 F.2d 1556, 1566-67 (11th Cir. 1990), Judge Cahn determined that the Plan fiduciaries abused their discretion in denying Plaintiffs' claims for 75/80 benefits.

The Plan appealed Judge Cahn's decision. In reversing, the Third Circuit Court of Appeals essentially disregarded all of Judge Cahn's factual findings, made its own factual findings that there was no bad faith or a conflict of interest, and applied a fully

deferential standard of review which doomed all of Plaintiffs' claims.

BASIS FOR FEDERAL JURISDICTION

This suit invoked federal jurisdiction pursuant to the Employee Retirement Income Security Act, 29 U.S.C. §1001, et seq.

ARGUMENT

The issue before this Court is of considerable significance in the arena where employers and employees wage battle over pension rights. It also goes to the heart of a District Court's fact-finding responsibilities and an appellate court's ability to disregard those findings to change the outcome of a case to its own liking.

In 1989, this Court issued its decision in Firestone Tire & Rubber Co. v. Bruch, 489 U.S. 115, 109 S. Ct. 948, 103 L.Ed. 2d 80 (1989), essentially holding that trial courts were to apply a de novo standard of review in evaluating decisions of ERISA plan fiduciaries, unless the plan provided for a more deferential standard. The obvious effect of that decision was that every employer which did not already incorporate a highly deferential standard in its plans to immediately cause them to be amended to take

advantage of that more relaxed standard of review. The net effect for employees has been that virtually all claims for ERISA benefits are now governed by an arbitrary and capricious standard. However, application of this standard, particularly where a conflict of interest (i.e., a factual finding) is unnecessarily and improperly disturbed by an appellate court, will clearly result in employees having less rights under ERISA than they would have had prior to the enactment of ERISA. In pre-ERISA cases where contract law principles applied, an employee could at least count on being able to argue that questionable plan provisions should be interpreted against the drafter, i.e., the employer. Now, however, this is not so, even where (as here) the Plan does not condition receipt of benefits on an event (i.e., "permanent" unemployment) on which the fiduciaries claim to have based their decision.

In the case before this Court, the Third Circuit Court of Appeals has truly compounded the workers' dilemma. The District Court engaged in a detailed and studied consideration of all the evidence and determined that the Plan fiduciaries had been acting in bad faith, under a conflict of interest and in an arbitrary and capricious manner in finding (as a factual matter) there had been a "temporary suspension" of employment (i.e., a layoff). The Court of Appeals disregarded all of that effort and concluded that a layoff or cessation of employment had not occurred, despite the fact that (a) the Stock Purchase Agreement between GATX and F. A. Holding specifically provided that the sale was a "termination of employment" for purposes of the Plan for all Fuller participants, (b) Petitioners had been sent letters by the Plan Administrator after the sale confirming there had been a

"termination" of their employment for Plan purposes, and (c) the lower courts factual determination that the Plaintiffs left work on the last day of their employment without jobs, and that they would not know until after the first of the year whether or not they would have jobs at the new Fuller Company. In reaching its decision, the District Court properly applied and relied upon the Eleventh Circuit's decision in Brown v. Blue Cross/Blue Shield of Alabama, Inc., supra. As a result, the Third Circuit's rejection of the District Court's rationale creates a likelihood of confusion among lower and appellate courts as to precisely what the arbitrary and capricious and/or abuse of discretion standard involves, and to what extent factual determinations of a District Court should be disregarded by a Court of Appeals.

To start with, there was a "layoff," there can be no doubt the Petitioners were

terminated, even though it may have been briefly, since (1) the Plan sponsor characterized the Fuller sale as a termination of employment in the Stock Purchase Agreement; and (2) GATX, the Plan sponsor, sent letters in March, 1987 to a member of Fuller participants confirming that "[their] services with GATX terminated on December 31, 1986." The underlying issue is whether this termination resulted from a "layoff" under the Plan document.

Respondent continuously argued that the term "layoff" has a meaning other than its common usage, i.e., temporary suspension of employment, and necessarily entails a long-term or permanent period of employment. However, the Plan does not state this, indeed, it contains no definition of "layoff." Respondent also contends that Petitioners did not suffer a layoff (hence, no termination of employment) because they were offered

positions with the new Fuller Company and suffered no break in their employment relationship. However, the District Court properly found (which the appellate court paid no heed) that since the Plan document did not make 75/80 point benefits contingent upon any specific period of unemployment, the fact that their jobs were temporarily suspended (terminated according to GATX) the Plan fiduciaries had read into the Plan a condition which did not exist. This, of course, is the essence of arbitrary and capricious conduct.

The Third Circuit, however, disagreed with the District Court's factual interpretation (and, essentially that of other courts which have been forced to define the term "layoff" where no other meaning is ascribed under the plan document) of a layoff.[3] Indeed, the Third Circuit agreed

[3]See CBS Inc. v. International Photographers of the Motion Picture Industries, Local 644, 603 F.2d 1061 (2d Cir.

with Respondent that the "most common" understanding of a layoff is where an employee suffers a loss of work time and direct compensation, yet there is neither evidence of this meaning under the Plan nor any other supporting authority offered on this issue. In short, the Third Circuit has held that it is not arbitrary and capricious for plan fiduciaries to "rewrite" a plan by imposing non-existent conditions. However, had GATX intended a requisite length of time to pass for a layoff to exist, they could have very easily done so in the Plan document. The fact that they didn't, yet later attempted to

1979) (A layoff consists of a period of temporary dismissal -- inherent in the term is the anticipation of recall); and International Alliance of Theatrical Stage Employees v. Gulf Int'l. Cinema Corp., 568 F.Supp. 1396 (E.D. La. 1983) (Layoff is no more than a suspension of work of an individual employee).

impose that requirement, is the essence of arbitrariness.[4]

The Plan fiduciaries were allowed by the Third Circuit to interpret the Plan document in any way they saw fit under the circumstances; regardless of the level of their conflict of interest.

On the conflict of interest issue, the Eleventh Circuit's decision in Brown is pivotal. In applying this Court's holding in Firestone Tire and Rubber Company v. Bruch, 489 U.S. 115, 109 S.Ct. 948, 103 L.Ed.2d 80

[4]Other employers have had no trouble more clearly defining the meaning of a layoff and/or the various possible types of terminations warranty certain enhanced levels of benefits. See Taylor v. The Continental Group, 933 F.2d 1227 (3d Cir. 1991) (Severance benefits due on "involuntary termination", defined as "any ... termination .... within two years after a change in control ...."); and Harper v. R.H. Macy & Co., 928 F.2d 544 (8th Cir. 1990) (Severance benefits available when employee is "permanently terminated or laid off for periods that exceed ninety days").

(1989), the Eleventh Circuit held in Brown as follows:

> A wrong but apparently reasonable interpretation is arbitrary and capricious if it advances the conflicting interest of the fiduciary at the expense of the affected beneficiary or beneficiaries unless the fiduciary justifies the interpretation on the ground of its benefit to the class of all participants and beneficiaries."

Brown v. Blue Cross/Blue Shield of Alabama, Inc., 898 F.2d 1556, 1566-67 (11th Cir. 1990). The Brown court correctly followed the Restatement (Second) of Trusts §187, Comment d (1959) which provides six factors in determining whether there is an abuse of discretion: (1)the extent of the discretion conferred upon the trustee by the terms of the trust; (2) the purposes of the trust; (3) the nature of the power; (4) the existence or non-existence), the definiteness or indefiniteness, of an external standard by which the reasonableness of the trustee's

conduct can be judged; (5) the motives of the trustee in exercising or refraining from exercising the power; and (6) the existence or nonexistence of an interest in the trustee conflicting with that of the beneficiaries.

In the case subjudice, the District Court followed Brown and found the Plan fiduciaries to have had "an interest" conflicting with that of the beneficiaries, i.e., a conflict of interest, when they denied Petitioners' claims for benefits. The Third Circuit simply refused to recognize this obvious conflict; perhaps that was the only way they could avoid directly test challenging Brown.

One undeniable indicator of the conflict found by the District Court was that the three-person benefits committee consisted entirely of high-ranking GATX officers who held the highest positions within the company. There was not a single voice on that Committee which would be inclined to speak up for the

workers whose lives were being affected by pension decisions such as this one. Moreover, since GATX sponsored the Plan, the District Court correctly found there was a monetary conflict.

> Because GATX had just sold Fuller, it had no incentive to consider the effect of the benefits decision on the morale and productivity of Fuller employees. Moreover, the fact that the denial affected a large number of employees and resulted in an estimated savings of $2 million for the Plan undermines the rationale for deferential review. The larger the expenditure, the greater the possibility that the sponsor will eventually have to replenish the Plan's funds."

Kotrosits v. GATX Corporation Non-Contributory Pension Plan for Salaried Employees, 757 F. Supp. 1434, 1156 (E.D. Pa. 1991). See also, Van Boxel v. Journal Co. Employees Pension Trust, 836 F.2d 1048 (7th Cir. 1987).

A trustee is required to "exclude all selfish interest and all consideration of the interest of third person" in making fiduciary decision. G. Bogert & G. Bogert, The Law of

Trust and Trustees, Section 543 at 197-98(2d) Rev. R. Ad. 1978). Here, GATX as Plan sponsor was unquestionably obligated to make all future contributions to this Plan which might result from any actuarial shortfalls. The Third Circuit, inexplicably felt this to be of no significance, even though the savings resulting to the Plan would be in excess of at least $2,000,000.00, because the Plan was "fully funded." This conclusion, however, overrode yet another factual finding of the District Court that such a significant considerable outlay would unquestionably have an effect on the company which is required to fund the Plan in the future, irrespective of the current financial condition of the Plan. Quite frankly, it is hard to fathom how avoiding such a major outlay of funds could not be deemed in GATX's interest (i.e., contrary to Plan beneficiaries' interests) when GATX is the company required to make all

future contributions to the Plan, the amount of those contributions will obviously be affected by such a major outlay, regardless of whether or not at any given point in time the Plan happens to have more or less assets than its accrued liabilities.[5]

Perhaps more importantly, the Third Circuit improperly and unfairly brushed aside

[5]There were differences of interpretation concerning actuaries' reports submitted concerning Plan assets and liabilities. Respondent contends it was "fully funded," claiming it had an $8.79 Million "surplus" as of January, 1986 and a $10.2 Million claiming "surplus" as of January 1, 987. However, the "accrued benefit" figure on which these numbers are based includes only benefits earned as of the valuation date; it does not anticipate future service or future salary increases which will undoubtedly occur (" . . . the accrued benefit values are very different from the ongoing (i.e., future) funding requirements which do include assumptions about future benefits to be earned") (emphasis supplied). In other words, it indicates "full funding" if the Plan would have been terminated (which obviously did not happen) on those dates. However, and more significantly, there is nothing on the record indicating that the Benefits Committee was aware of this supposed current (as opposed to future) funding "surplus" when it denied Plaintiffs' claims for benefits.

an even more direct and compelling indication of the fiduciaries' conflict of interest, i.e., that by denying Petitioners' 75/80 claims, GATX avoided its direct out-of-pocket liability for the lifetime medical and life insurance benefits for the Souders class. These are precisely the type of unfunded welfare benefits which courts have repeatedly and consistently found trigger a conflict of interest. Moreover, there was nothing preventing the Third Circuit from taking judicial notice of the high cost of retirees' medical costs. See Fed.R.Evid. 201(f). See Mainline Investment Corp. v. Gaines, 407 F. Supp. 423 (N.D. Tex. 1976) (judicial notice taken of rising oil prices). Fox v. Kane-Miller Corp., 398 F. Supp. 609 (D. Md. 1975), aff'd., 542 F.2d 915 (4th Cir. 1975). See also BNA Pension Reporter, Volume 17, No. 38, p. 1591 (September 17, 1990) (discussing costs of retiree medical benefits. However, the

Third Circuit ignored this authority and blithely shrugged off the significance of these welfare benefits as they related to the conflict of interest issue.

It is submitted that the Third Circuit felt compelled to override the District Court's factual finding that there has conflict of interest because of its critical significance under the Eleventh Circuit's decision in Brown v. Blue Cross/Blue Shield of Alabama. It is further submitted that the effect of the Third Circuit's action is to do an end run on Brown, thereby establishing precedent for other courts to avoid the sound rationale and holding of Brown, particularly given the imminent demise of the de novo standard of review as previously discussed. The logic and holding of the Brown decision is so important it bears discussion.

In that case, the defendant/ insurer/administrator had denied plaintiff's

claim for hospitalization benefits under a group health plan. The denial was based on the plaintiff's supposed failure to obtain pre-certification for the hospital admission.

The District Court for the defendant, holding that the denial of benefits denial was not arbitrary and capricious.[6] In reversing, the Eleventh Circuit first noted that under Firestone, courts should consider common law principles applicable to trusts in evaluating whether there has been an abuse of discretion.[7] The court then dutifully

[6]Interestingly, the effect of the Third Circuit's decision in this case is the same as holding that the District Court should have entered summary judgment in favor of the Plan and against the within Petitioners. That is, the Third Circuit essentially held that taking all facts as true before the District Court (even though the Third Circuit redefined those facts on its own), Petitioners could not prevail as a matter of law.

[7]In Firestone, this Court when speaking the application of the abuse of discretion standard, noted that the fiduciary's conflict of interest should be weighed as "a factor" in determining whether there has been an abuse of discretion. Firestone Tire & Rubber Co., 489

followed this Honorable Supreme Court's direction in Firestone, citing and discussing the six factors enumerated in Section 187 of the Restatement (Second) of Trusts. (Id. at 1564-65). After an exhaustive review of those criteria, plus the history of and rationale behind the abuse of discretion standard, the court established the following rule:

> When a plan fiduciary demonstrates a substantial conflict of interest on the part of the fiduciary responsible for benefits determinations, the burden shifts to the fiduciary to prove that its interpretation of plan provisions committed to its discretion was not tainted by self-interest. That is, a wrong but apparently reasonable interpretation is arbitrary and capricious if it advances the conflicting interest of the fiduciary at the expense of the affected beneficiary or beneficiaries unless the

U.S. at 115, 109 S.Ct. at 956, 103 L.Ed. 2d at 95.

> fiduciary justifies the interpretation on the ground of its benefit to the class of all participants and beneficiaries. Id. at 1566-67.

The Brown court shifted the burden to the fiduciaries to justify their actions because people having a conflict of interest

> . . . inherently implicate the hobgoblin of self-interest. Adverse benefits determinations save considerable sums that are returned to the fiduciaries' corporate coffers. The presumption that the fiduciaries acted for the future stability of the fund cannot be entertained. Id. at 1568.[8]

The court further noted that,

> [t]he area of discretion to which deference is paid must be confined narrowly to decisions for which a

[8]The Brown court also went on to hold that if the fiduciary sufficiently justifies his conduct, the burden then shifts back to the plaintiff to demonstrate that conduct is "arbitrary and capricious by other measures" (Id. at 1568).

> conflicted beneficiary can demonstrate that it is operating exclusively in the interests of the plan participants and beneficiaries . . . . The fiduciary, however, should bear the burden of dispelling the notion that its conflict of interest has tainted its judgment. Id.

Since Brown was decided, it has been approvingly cited by two other panels of the 11th Circuit. See Anderson v. Blue Cross/Blue Shield of Alabama, 907 F.2d 1072 (11th Cir. 1990) and Newell v. Prudential Insurance Company of America, 904 F.2d 644 (11th Cir. 1990). It has also been followed in Poole v. Seattle-First National Bank, 741 F. Supp. at 846 ("find[ing] the reasoning in Brown to be persuasive"); and Cargile v. Confederation Life Insurance Group Plans, 748 F. Supp. 874 (N.D. Ga. 1990).[9] Other courts have taken

[9]In Cargile, the defendants' effort to justify their decision on the basis of its benefit to other participants, consisted of a single self-serving sentence in defendant's

notice of the general principles of Brown, even though not having to apply its specific holding of to their facts. Bass v. The Prudential Insurance Company of America, 1991 U.S. Dist. LEXIS 7720 (D. Kan. May 29, 1991); In re: Gulf Pension Litigation, No. 86-4365, 1991 U.S. Dist. LEXIS 4631 (S.D. Texas, April 10, 1991). Miller v. Metropolitan Life Insurance Co., 925 F.2d 979 (6th Cir. 1991); Daniels v. Anchor Hocking Corp., 758 F. Supp. 326, 355 (W.D. Pa. 1991). Moreover, Petitioners have been unable to locate a single decision challenging or criticizing the abuse of discretion test established in Brown.

Brief that the fiduciary had sought to conserve the plan assets. (Id. at 880). The court ruled that this "naked assertion" cannot "purge the taint of self-interest." Id. Ironically, in this case, Respondent made a last-minute desperate effort to place evidence before the District Court that the Plan Administrator was acting in the best interest of all participants. This consisted of a conclusory and virtually meaningless Affidavit submitted by the Plan Administrator, Mr. Herbert, which the District Court correctly gave little credence.

Here, the District Court found as a factual matter that the Plan had failed to sustain its burden of proving that denial of Plaintiffs' 75/80 claims benefitted other participants or beneficiaries (757 F. Supp. at 1461). Under Brown, this absolutely mandates a conclusion that the Plan fiduciaries abused their discretion in denying Plaintiffs' claims for benefits. Critically however, the Third Circuit's refusal to get to this issue by overruling the District Court's finding of a "conflict" completely undermines Brown and sends conflicting and confusing signals to trial and appellate courts. In particular, can an appellate court wishing to avoid the effects of Brown do so by simply reversing the District Court's factual finding that there was a conflict of interest? Or shouldn't the appropriate level of deference be accorded the lower court's factual findings, with an appellate court then being bound to follow the

test laid down in Brown, i.e., once a conflict exists, then has the fiduciary met its burden of proving it acted in the best interest of all Plan participants and if he hasn't, then he has abused his discretion.

Lastly, the Third Circuit's decision has implications concerning the application of the arbitrary and capricious standard above and beyond its side-stepping of Brown. Here, the Third Circuit advocates that unless there is a "direct" conflict (not "a conflict" as discussed in Brown and in Restatement of Trust, Section 167), a plan fiduciary's decision should be afforded full deference irrespective of the fact that the fiduciaries (as here) consist of a stacked deck of individuals who are obviously pro-employer and anti-employee.

There was certainly a divergence of opinion, even prior to this Court's decision in Firestone, as to what constituted an abuse

of discretion or arbitrary and capricious conduct by plan fiduciaries.

The Fifth Circuit followed a three part test to evaluate a plan administrator's good faith: (1) uniformity of construction; (2) "fair reading" and reasonableness of that reading; and (3) unanticipated costs. Dennard v. Richards Group, Inc., 681 F.2d 306, 314 (5th Cir. 1982). The Eighth Circuit defined the arbitrary and capricious standard as requiring a determination of whether the fiduciary's decision was supported by substantial evidence, was contrary to law or was made in bad faith. See Niagara Paper Corp. v. Paper Industrial Union Management Pension Fund, 800 F.2d 742, 745-46 (8th Cir. 1986); Short v. Central States Southeast and South West Areas Pension Fund, 729 F.2d 567, 571 (8th Cir. 1984). The Seventh Circuit required proof that the fiduciary's decision was arbitrary, fraudulent or in bad faith.

Sly v. P.R. Mallory & Co., 712 F.2d 1209 (7th Cir. 1983). The pre-Firestone and pre-Brown test in the Eleventh Circuit was "whether [the trustees] interpretation was made rationally and in good faith - not whether it was right." Anderson v. Ciba-Geigy Corp., 759 F.2d at, 1522. In a post-Firestone case, but pre-dating Brown, the 11th Circuit cited the three part test referenced in Dennard, supra. See Guy v. Southeastern Iron Workers Welfare Fund, 877 F.2d 37 (11th Cir. 1989).

It is submitted that, having given the Firestone decision a chance to be digested and applied by the District and Circuit Courts, there is confusion as to (a) a District Court's fact-finding responsibilities, and particularly as to how far an appellate court should transgress in overturning well substantiating findings such as were made in this case by the District Court, and (2) how precisely the arbitrary and capricious

standard is to be applied, particularly the extent which a conflict of interest plays, and to what level (i.e., direct, indirect, intermediate, etc.) that conflict must rise to trigger the test enunciated by the Eleventh Circuit in Brown. However, regardless of the test formulated, it is submitted that the Third Circuit here did precisely what it admonished the District Court not to do, i.e., it ignored the District Court's well-supported factual findings of bad faith, conflict of interest and interpretation of plain Plan language. By contrast, it is inconceivable, as a matter of law, that an injustice has not occurred here, and that the obviously conflicted fiduciaries (all major officers of GATX) did not abuse their discretion, in applying an interpretive gloss to the word "layoff" which did not exist in the Plan, when (a) they did not have any information before them concerning the funded status of the Plan,

(b) the fiduciaries put nothing meaningful on the record before the lower court from which anyone could reasonably conclude they were acting in the interest of anyone other than an impermissible party i.e., GATX, (c) they attempted to claim there was no "termination" of employment, despite the fact that the Stock Purchase Agreement and a post-closing letter sent by Plan representatives clearly indicated that there had been such a termination, (d) they sought to base their decision on the existence of a pension plan for the new Fuller Company which had not yet been adopted and which Fuller had no duty to adopt, and (e) they sought to "rely" on the prior transactions (i.e., MTL, TEC, etc.) was completely misguided because the scanned information which they had received from the Plan Administrator was very misleading as to the nature of those transactions and indeed on closer scrutiny, those transactions undercut

the decision made by the fiduciaries in this case.

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